Supreme Court, U.S.
FILED

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**IN THE UNITED STATES OF AMERICA**
**SUPREME COURT**

**FALL TERM**

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**THURMAN J. RIGGAN and JOSEPH J. WESTER,**

**Petitioners,**

**v.**

**CITY OF SAINT PAUL, SAINT PAUL ISLAND, ALASKA,**

**Respondent.**

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether there exists a public policy exception to a forum selection clause in an employment contract between a city and a police officer, which clause requires that the venue in litigation involving the construction and performance of the employment contract be in the Superior Court for the State of Alaska, Third Judicial District at Anchorage, with respect to litigation which involves neither the construction nor the performance of the term and conditions of the employment contract, but rather involves a claim for overtime wages under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, when the remedial requirements of the Fair Labor Standards Act involve public rights, which public rights cannot be waived by individual claimants and when the employment contract is silent on the question of overtime wages?

## PARTIES TO THE PROCEEDING

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## REPORTS OF OPINIONS

The Ninth Circuit held that its disposition was not appropriate for publication and could not be cited to or by the courts of the Ninth Circuit except as provided by 9th Cir. R. 36-3.

## JURISDICTIONAL GROUNDS

**A. Date of Entry of Judgment**

July 10, 1995

**B. Date of Order on Petition for Rehearing**

June 28, 1995

**C. Statutory Basis for Supreme Court Jurisdiction**

28 U.S.C. § 1254.

**D. Statutes**

Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

**E. Statement of the Case**

Plaintiff Police Officers responded to advertising in the State of Washington by Defendant City for public safety employees in the State of Alaska. After negotiations by telephone between Plaintiff Police Officers and Defendant City in Washington and Alaska, respectively, Defendant City sent employment contracts to Plaintiff Police Officers in the State of Washington, where the contracts were duly executed.

The employment contracts each contained a provision stating "[t]his Agreement is made and shall be construed under the laws of the State of Alaska. Venue shall be in the Superior Court for the State of Alaska, Third Judicial District at Anchorage." The employment contracts had no provisions relating directly or indirectly to the question of overtime wages.

Defendant City had extensive business dealings, involving a substantial portion of the city's budget, with the State of Washington.

Plaintiff Police Officers worked for Defendant City as public safety officers, until the contracts were mutually

concluded. Subsequently, Plaintiff Police Officers filed a lawsuit in the United States District Court in the State of Washington, which lawsuit alleged that Defendant City owed Plaintiff Police Officers overtime wages under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

Defendant City moved to dismiss the action on the grounds that, first, the District Court lacked either specific or general personal jurisdiction and that, second, venue was improper given the employment contracts forum selection clauses. The District Court held both that it had neither personal nor general personal jurisdiction and that the forum selection clause in the employment contracts mandated that the action be heard in the Superior Court of the Third Judicial District at Anchorage, Alaska.

Plaintiff Police Officers appealed the District Court's order to the Ninth Circuit Court of Appeals. The Ninth Circuit held that the forum selection clause was ". . . valid, and that the District Court did not err in holding that it lacked personal jurisdiction." Plaintiff Police Officers petitioned the Ninth Circuit for rehearing. On June 28,

1995, the Ninth Circuit denied Plaintiffs' petition. Judgment was entered on July 10, 1995.

**F. District and Appellate Court Jurisdiction**

The United States District Court had original subject-matter jurisdiction under 28 U.S.C. § 1337. The United States Court of Appeals had jurisdiction under 28 U.S.C. §1291.

**G. Argument**

This Court decided that reasonable contractual forum selection clauses with respect to litigation concerning the construction and performance of contracts should be held valid. M/S Bremen v. Zapada Off-Shore Co., 407 U.S. 1, 32 L.Ed.2d 513, 92 S.Ct. 1907 (1972); Scherk v. Alberto-Culver Co., 417 U.S. 506, 41 L.Ed.2d 270, 94 S.Ct. 2449, reh. den 419 U.S. 885, 42 L.Ed.2d 129, 95 S.Ct. 157 (1974); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 113 L.Ed.2d 622, 11 S.Ct. 1522 (1991); *also see* Restatement of Conflict of Laws 2d § 80.

Since this Court's reasoned enunciation of the respect to be accorded forum selection clauses, an

important subsidiary question has arisen. The subsidiary question involves what effect will be given to forum selection clauses when the litigation is tangentially related to a contract with such a forum selection clause, but principally involves matters of important policies and rights provided for by the United States Congress outside the contract.

For example, in Red Bull Associates v. Best Western International, Inc., 862 F.2d 963, 967 (2nd Cir. 1988), a Best Western motel franchise license was terminated for grounds which implicated important federal policies involving race discrimination. Best Western required that franchisees keep their accommodations up to certain standards. But the facts alleged in the complaint of the plaintiff franchise licensee indicated that Best Western had determined that race discrimination was the real basis for the revocation of the franchise license for poor upkeep. The Second Circuit held that there was a "public policy" exception to the general rule in Bremen, 407 U.S. at 15, 92 S.Ct. at 1916, in discrimination cases.

Another way to put the Red Bull reasoning by the Second Circuit is that the real subject of the litigation was not the terms and conditions of the franchise contract, but rather the question of discrimination by Best Western against minorities, so that the forum selection clause should not be given effect. Nelson v. Master Lease Corp., 759 F. Supp. 1397 (D. Minn. 1991), followed the reasoning in Red Bull.

The present litigation is similar to Red Bull, and, indeed, provides a stronger rationale for application of the Red Bull "public policy" exception. In this action, none of Plaintiff Police Officers allegations concern either the construction or the performance of the employment contracts. Rather, all that is implicated is the failure of Defendant City to pay overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Nothing in the employment contract will be relevant to this litigation.

The minimum wage and overtime wage provisions under the Fair Labor Standards Act have long been considered to be public rights which employees do not have

the power to waive, because those rights implicate important matters of public policy. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 89 L.Ed 1296, 65 S.Ct. 895, reh. den. 325 U.S. 893, 89 L.Ed. 2005, 65 S.Ct. 1189 (1945). Indeed, one court has held that, under the Fair Labor Standards Act, even if an employee refuses to accept money upon recovery, that money is to be paid into the Treasury of the United States. Brennan v. Sinor, 391 F. Supp. 681 (N.D. Okla. 1974). And, even if there is a *bona fide* dispute as to liability for overtime compensation and liquidated damages, an employee cannot bargain away his or her rights through settlement, accord and satisfaction. D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 90 L.Ed. 1114, 66 S.Ct. 925 (1946).

Other types of litigation, in addition to policy questions involving discrimination and the Fair Labor Standards Act, relating to the Red Bull "public policy" exception certainly has been and will again arise, e.g., under the Civil Rights Act of 1864, 42 U.S.C. § 1983, ERISA, etc. So, the question is, are federal claims for

overtime wages having nothing to do with the provisions or performance of an employment contract between a city and a citizen subject to a forum selection clause arising out of the employment contract?

This is an important question this Court needs to decide, and the Ninth Circuit's decision in this action seems to be inconsistent with the Second Circuit's "public policy" exceptions.

Paul H. King
Attorney for Petitioners

# APPENDIX

## 1. Relevant Statutes: 29 U.S.C. § 207

**"§ 207. Maximum hours**

(a)(1) Except as otherwise provided in this section, no employer shall emply any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed . . . ."

**2. Initial Ruling on Appeal**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| Thurman J. Riggan<br>Joseph J. Wester,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>City of Saint Paul;<br>Saint Paul Island; Alaska,<br><br>Defendants-Appellees. | ) | No. 94-35169<br><br>D.C. No. CV-<br>93-00653-TSZ<br><br>MEMOR-<br>ANDUM* |

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding
Submitted March 9, 1995**

Before: Pregerson, Kozinski and Leavy,

Circuit Judges

The employment contract that Riggan and Wester ("R & W") each made with the city provides that the "Agreement is made and shall be construed and performed under the laws of the State of Alaska. Venue shall be in the Superior Court for the State of Alaska, Third Judicial District at Anchorage." ER 31, 39. R & W argue that this forum selection

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-6.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

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clause doesn't govern their dispute because it appears in a section of the agreement entitled "Construction of Agreement." However, the agreement specifically provides that "the captions and heading . . . are not to be used to interpret or define the provisions" of the Agreement. Id.

R & W have made no showing that the forum selection clause was obtained through fraud or unenforceable for any other reason. See Spradline v. Lear Siegler Management Servs., Inc., 926 F.2d 865, 867-69 (9th Cir. 1991). The clause is valid, and the district court did not err in holding that it lacked personal jurisdiction over the defendants.

AFFIRMED.

**3. Ruling on Petition for Rehearing**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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|---|---|
| Thurman J. Riggan<br>Joseph J. Wester,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>City of Saint Paul;<br>Saint Paul Island; Alaska,<br><br>Defendants-Appellees. | No. 94-35169<br><br>D.C. No. CV-<br>93-00653-TSZ<br><br>ORDER |

Before: Pregerson, Kozinski and Leavy, Circuit Judges

The petition for rehearing is DENIED.